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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ISAAC,

Defendant and Appellant.

A132378

(Sonoma County
Super. Ct. Nos.
SCR-552115, SCR-552981)

Defendant appeals from a judgment following his plea of no contest and imposition of sentence. Defendant's appellate counsel has not raised any issues and instead has asked this court to undertake an independent review of the record to determine whether there are any issues that would, if resolved favorably to defendant, result in reversal or modification of the judgment. (*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436.) Counsel declares in her affidavit that she notified defendant he could file a supplemental brief raising any issues he wishes to present to this court. No supplemental brief has been received. Upon independent review of the record, we conclude that no arguable issues are presented for review, and affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

Two separate criminal cases were filed against defendant. The first case stems from defendant's uninvited appearance on the night of December 22, 2008, at an apartment on Piner Road in Santa Rosa, occupied by three men and a woman. He knocked on the front door of the apartment wearing a Christmas hat, holding a shotgun at his side. When one of the three occupants of the apartment responded defendant directed him inside. Still holding the shotgun defendant asked for money and marijuana. When defendant pointed the shotgun at one of the occupants, he grabbed the barrel and pushed it away. A struggle ensued, during which the apartment occupants disengaged defendant from the gun and struck him in the head with it. They also punched defendant repeatedly, knocking him momentarily unconscious, and subdued him until the police arrived. \

Defendant was arrested for burglary and incarcerated in Sonoma County jail. After defendant "received a minor rule violation" on January 1, 2009, he continually threatened a correctional officer by stating that he "was going to find out" where the officer lived, kill his family and children, and make his job "a living hell."

After the case had been set for trial many times, on March 17, 2011, in a negotiated plea agreement defendant entered no contest pleas in both cases: in case number SCR-552115, to burglary (Pen. Code, § 459) and a firearm use enhancement (Pen. Code, § 12022.5), with a sentencing range of a minimum of five to a maximum exposure of 16 years in state prison; in case number SCR-552981, to resisting an executive officer by threat, force or violence (Pen. Code, § 69), with a specified consecutive term of eight months.² The pleas specified that probation "will be denied."

On May 4, 2011, defendant moved pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), to relieve his appointed counsel and pursue withdrawal of his no contest plea. At a closed hearing defendant asserted that counsel refused to confer with him,

¹ Since the present appeal is taken from a no contest plea, we need only recite in the most summary fashion the facts pertinent to the underlying conviction as necessary to our limited review on appeal. The facts are taken from the reporter's transcript of the preliminary hearing.

² Additional charges in case number SCR-552115 were dismissed.

failed to disclose evidence to him, and “misled” him as to his potential state prison term and the immigration consequences of the plea. When questioned, counsel recounted for the trial court his preparation for trial, his many conferences with defendant, the evidence he presented to defendant, his discussions of the plea offer and sentencing range, specifically his admonishment to defendant that “probation was going to be precluded” by the plea, and his explanation to defendant “that he would, in fact be deported” if he was sentenced to state prison. Counsel also stated that he was “ready, willing and able to go to trial” in the case, and had not encouraged defendant to accept the plea offer, but felt the offer was in defendant’s best interests.

At a continued *Marsden* hearing two days later, defendant indicated that he was seeking to retain private counsel, so the hearing was further continued. By May 16, 2011, defendant advised the court that he did not hire private counsel, and wanted to proceed with the *Marsden* motion to appoint substitute counsel. Defendant reiterated his complaints with his appointed attorney, particularly the failure of counsel to assist with withdrawal of his plea. He also indicated that if counsel refused to move to withdraw his plea, he wanted to “go ahead and file the motion” himself. The court advised defendant that if his *Marsden* motion was denied, he could seek to represent himself. Counsel responded that he advised defendant “there was no legal basis to withdraw the plea,” and “it wouldn’t be in his best interest” to do so. At the conclusion of the hearing the court denied the *Marsden* motion.

Defendant did not thereafter bring a motion to represent himself or a motion to vacate the plea. The sentencing hearing was conducted on May 26, 2011. The trial court denied probation and imposed an aggregate state prison term on defendant of 10 years and 8 months, computed as follows: the aggravated term for burglary of six years; a consecutive middle term of four years for the firearm enhancement; and, a consecutive middle term of eight months for the offense of resisting an executive officer by threat, force or violence.

Notice of appeal was timely filed, but the record does not show that defendant obtained a certificate of probable cause.

DISCUSSION

Defendant's no contest plea and failure to obtain a certificate of probable cause limit the issues subject to consideration on appeal. " 'A defendant who has pleaded guilty or nolo contendere to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon' must fully comply with section 1237.5 and rule 8.304(b) of the California Rules of Court, which require that the defendant secure a certificate of probable cause in order to challenge the validity of the plea." (*People v. Puente* (2008) 165 Cal.App.4th 1143, 1149.) "A defendant may not appeal 'from a judgment of conviction upon a plea of guilty or nolo contendere,' unless he has obtained a certificate of probable cause. (§ 1237.5, subd. (b); see *People v. Buttram* (2003) 30 Cal.4th 773, 790 [134 Cal.Rptr.2d 571, 69 P.3d 420] . . . [§ 1237.5's purpose is 'to weed out frivolous and vexatious appeals from pleas of guilty or no contest, before clerical and judicial resources are wasted'].)" (*People v. Cuevas* (2008) 44 Cal.4th 374, 379.) " 'Despite this broad language, we have held that two types of issues may be raised on appeal following a guilty or nolo plea without the need for a certificate: issues relating to the validity of a search and seizure, for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m), and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.' " (*People v. Shelton* (2006) 37 Cal.4th 759, 766, quoting *Buttram, supra*, at p. 780.)³ "Our Supreme Court has expressly disapproved the

³ California Rules of Court, rule 8.304(b), provides "(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court—with the notice of appeal required by (a)—the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] (2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate. [¶] (3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal 'Inoperative,' notify the defendant, and send a copy of the marked notice of appeal to the district appellate project. [¶] (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or [¶] (B) Grounds that arose after entry of the plea and do not affect the plea's validity. [¶] (5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1)."

practice of applying the rule loosely in order to reach issues that would otherwise be precluded.” (*Puente, supra*, at p. 1149, citing *People v. Mendez* (1999) 19 Cal.4th 1084, 1098–1099.)

We find no arguable search and seizure issues. Defendant did not make a motion to suppress evidence pursuant to section 1538.5, and the record does not reveal any search and seizure issues to be considered.

Without a certificate of probable cause defendant is not entitled to review of the validity of his plea. (*People v. Johnson* (2009) 47 Cal.4th 668, 675; *People v. Brown* (2010) 181 Cal.App.4th 356, 360–361; *People v. Cole* (2001) 88 Cal.App.4th 850, 868.) The long-established rule is that “[a] defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs *after* the guilty plea.” (*Johnson, supra*, at p. 679; see also *People v. Arriaga* (2011) 201 Cal.App.4th 429, 435.) A certificate must be obtained to secure review of the failure to advise of the penal consequences of a defendant’s guilty plea, failure to advise of immigration consequences, or mistaken advisement regarding potential sentencing. (*Arriaga, supra*, at p. 434; *People v. Placencia* (2011) 194 Cal.App.4th 489, 494; *People v. Robinson* (1988) 205 Cal.App.3d 280, 282–283; *People v. Pearson* (1981) 120 Cal.App.3d 782, 791.) We further conclude that the record does not establish any grounds to support a motion to withdraw the plea.

The denial of defendant’s post-plea *Marsden* motion is cognizable on appeal, but was not error. (*People v. Oglesby* (2008) 158 Cal.App.4th 818, 826; *People v. Vera* (2004) 122 Cal.App.4th 970, 977.) Before denying the motion, the trial court properly granted appellant the opportunity to explain the specific reasons for seeking substitution of counsel. (*People v. Lucky* (1988) 45 Cal.3d 259, 281; *People v. Lewis* (1978) 20 Cal.3d 496, 497; *People v. Sharp* (1994) 29 Cal.App.4th 1772, 1786.) The motion was also properly denied. “ ‘[T]he decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court, and a defendant has no absolute right to more than one appointed

attorney.’ [Citation.]” (*People v. Leonard* (2000) 78 Cal.App.4th 776, 786.) The court is not obligated to appoint independent counsel absent adequate proof of need by the defendant. (*People v. Memro* (1995) 11 Cal.4th 786, 858–859; *People v. Smith* (1993) 6 Cal.4th 684, 696; *People v. Sharp, supra*, at p. 1786, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.) “The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing.” (*People v. Smith, supra*, at p. 696; *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1022–1023.) Appointment of substitute counsel is necessary, “when, and only when, . . . under the *Marsden* standard, . . . in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].” (*People v. Smith, supra*, at p. 696; see also *People v. Fierro* (1991) 1 Cal.4th 173, 204; *People v. Crandell* (1988) 46 Cal.3d 833, 854; *People v. Leonard, supra*, at p. 786.) Defendant did not articulate adequate grounds to obtain substitution of counsel.

There are no sentencing errors. In imposing sentence, the trial court properly considered evidence in the record, including the information in the probation report. The denial of probation was in accord with the law and thoroughly supported by the evidence. The trial court properly provided a statement of valid reasons for the sentencing choices to deny probation, and to impose the aggravated term for burglary and consecutive terms for the remaining convictions. (Rule 4.406(b); *People v. Hawthorne* (1991) 226 Cal.App.3d 789, 792.) The total term of 10 years and 8 months was appropriate and in accord with the plea agreement. The court was also justified in imposing the fines and victim restitution. No error in the calculation of a total of 1,015 days of presentence custody credits is established.

On the record before us we find that defendant was represented by competent counsel throughout the proceedings.

After a full review of the record, we find no arguable issues and, accordingly, affirm the judgment.⁴

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.

⁴ By separate order filed this date, we deny defendant's related petition for writ of habeas corpus (A134904), based on a claim of ineffective assistance of counsel.